

MOUNTAIN STATES TELEPHONE & TELEGRAPH CO.

IBLA 81-776

Decided November 30, 1981

Appeal from Bureau of Land Management decision imposing reappraised annual rental charges for communication site right-of-way W-19109.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Regulations: Applicability -- Rights-of-Way: Act of March 4, 1911

Generally, new procedural regulations may be promulgated with retroactive effect and applied to a holder of preexisting interests. However, the present revised regulations in 43 CFR Part 2800 were not written with such effect. Therefore, where an easement for a right-of-way was issued pursuant to the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), and was not conformed to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1976), in accordance with sec. 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), regulation 43 CFR 2803.1-2(d), which allows rental adjustment without a prior hearing, is not applicable.

2. Administrative Procedure: Hearings -- Appraisals -- Communication Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911

Under 43 CFR 2802.1-7(e) (1979), which provided that charges for use and occupancy of a communication site on public lands may be revised after notice and an opportunity for hearing, it is improper

to increase such charges without following the prescribed procedure.

3. Administrative Procedure: Hearings -- Appraisals -- Communication Sites -- Hearings -- Rights-of-Way: Act of March 4, 1911

While the requirement of 43 CFR 2802.1-7(e) (1979) for notice and opportunity for a hearing may be satisfied by a hearing before an Administrative Law Judge, that requirement may also be fulfilled at the state office level in accordance with the basic procedural parameters set forth in Circle L, Inc., 36 IBLA 260 (1978).

APPEARANCES: John R. Stoller, Esq., Denver, Colorado, for appellant; Marla E. Mansfield, Esq., Denver, Colorado, Department counsel.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

By its decision dated May 19, 1981, the Wyoming State Office, Bureau of Land Management (BLM), informed the Mountain States Telephone and Telegraph Company (appellant) that the annual rental charge for right-of-way W-19109 (for a communications site and access road) would be increased to \$ 175. No hearing was afforded. The decision cited the regulations in 43 CFR Part 2800, and specifically 43 CFR 2804.1(b).

The right-of-way, a 100-foot by 100-foot tract in Carbon County, Wyoming, was granted on January 2, 1970, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), for a term of 50 years. The rental for the first 10 years was \$ 275.

Appellant asserts that the BLM appraisal, upon which the increase is predicated, is erroneous in many respects, and that the company has a right to a hearing before any increase may be imposed. Appellant relies upon 43 CFR 2802.1-7(e) (1979), in effect when the right-of-way was granted, and which provided:

At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year. [Emphasis added.]

In responding, counsel for BLM has denied that appellant has a vested right to any procedure, contending that the new regulations promulgated to implement the right-of-way provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1769(a) (1976), do not provide for such. Moreover, BLM argues that the new procedural rules can be applied retroactively, citing Sun Oil Co. v. Federal Power Commission, 256 F.2d 233 (9th Cir. 1958), cert. denied,

358 U.S. 872; Pacific Molasses Co. v. F.T.C., 356 F.2d 386 (5th Cir. 1966); Summit Nursing Home, Inc. v. United States, 572 F.2d 737 (Ct. Cl. 1978).

[1, 2] This identical issue was recently addressed by this Board in American Telephone & Telegraph Co., 57 IBLA 215 (1981). We agreed with BLM that, as a general proposition, new procedural regulations may be promulgated with retroactive effect. However, we found that the language employed in the new regulations at 43 CFR Part 2800 limited their applicability to rights-of-way issued under authority of FLPMA and those pre-existing rights-of-way which had been conformed to FLPMA in accordance with 43 U.S.C. § 1769(a) (1979). James W. Smith (On Reconsideration), 55 IBLA 390 (1981).

Therefore, where, as in this case, a right-of-way has been issued pursuant to the Act of March 4, 1911, and has not been conformed to FLPMA, no rental increase may be imposed until after reasonable notice and an opportunity for hearing.

[3] Appellant and BLM have indicated that if a hearing is to be conducted, each would prefer that it be held before an Administrative Law Judge. While the Board may, at its discretion, order that such a hearing be conducted before an Administrative Law Judge pursuant to 43 CFR 4.415, the requirement for a hearing under 43 CFR 2802.1-7(e) (1979) may also be satisfied at the BLM state office level in accordance with the basic procedural parameters set forth in Circle L, Inc., 36 IBLA 260 (1978).

In American Telephone & Telegraph Co. (On Reconsideration), 59 IBLA 343 (1981), we concluded that the more appropriate procedure and forum for such hearings would ordinarily be the BLM state office concerned. This is particularly true where, as here, the cost to the Government of conducting the hearing before an Administrative Law Judge would more than negate the benefit which would accrue to the public through any rental increase which might result.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to the Wyoming State Office, BLM, for further action consistent herewith.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

